IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1397

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

VIVIENNE ELLA WELTON,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, VIVIENNE ELLA WELTON, respectfully prays that the Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, be denied.

I

INTRODUCTORY STATEMENT

Following her conviction in the Los Angeles Municipal Court for violation of Section 42.00(d) of the Los Angeles Municipal Court, respondent appealed to the Appellate Department, and won reversal of her conviction.

Among the grounds for appeal asserted were:

1. L.A.M.C. §42.00(d) in conjunction with L.A.M.C. §42.00(j) is unconstitutional in that its provisions are overbroad, proscribing constitutionally protected written material along with non-protected matter.

2. Subsection (j) in affording protection to newspapers and news periodicals while denying protection to other printed material, is discriminatory and denies to respondent the equal protection of the law.

The Appellate Department ruled that L.A.M.C. §42.00(d), as amended, was unconstitutional on its face, but remanded the case to the Municipal Court for further proceedings.

Prior to its amendment, L.A.M.C. subsection (j) commonly known as a "savings clause", exempted all printed material from the operation of L.A.M.C. §42.00(d), the ordinance which banned sale of goods, wares and merchandise upon and along public streets. It was the 1972 amendment of subsection (j), reducing protected material to an arbitrary category of newspapers and news periodicals, which formed the basis of respondent's appeal.

The prosecution is now petitioning this Honorable Court to review and challenge the Appellate Department's finding.

II

BASIS FOR THE HOLDING OF UNCONSTITUTIONALITY-UNCONSTITUTIONAL OVERBREADTH

This Court has long held that Municipal ordinances which violate an individual's right of freedom of speech and press guaranteed by the First Amendment, constitute unlawful State action under the 14th Amendment, and will be struck down. See Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct.

666 (1938). It has been long recognized that the right to distribute ideas and written materials constitutes an important part of free speech, as well as free press. See Lovell, supra; see also Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943).

A local ordinance restricting the sale and distribution of printed matter will survive First Amendment challenge only if it serves a legitimate end and is narrowly drawn to achieve that end. See Lovell v. City of Griffin, supra; see also Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669 (1943).

The ordinance in question, L.A.M.C. §42.00(d) restricts the sale of goods, wares and merchandise on any street, sidewalk or parkway. In making this restriction, the legislature has also banned the sale of all printed matter without regard to its content. The savings clause, subsection (j), exempts only newspapers and news periodicals.[1/] Thus, the result is

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1/ Unquestionably, this is a denial of equal protection, as the distinction is arbitrary. This was urged in the Court below, however the opinion of unconstitutionality was based on an "overbreadth" evaluation.

to ban such traditionally protected material as religious pamphlets, political treatises, and other educational and informative material.

III

PETITIONER'S FAILURE TO DISTINGUISH BETWEEN COMMERCIAL ADVERTISING AND COMMERCIAL ACTIVITY

Petitioner asserts that "the law is crystal clear that commercial printed matter cannot be peddled on public streets and sidewalks under the guise of First Amendment protection." See Petitioner's Brief, page 18.

In support thereof, the cases of Schneider v. State, 308 U.S. 147, 60 S.Ct. 146 (1939), Valentine v.Chrestensen, 316 U.S. 52, 62 S.Ct. 920 (1942), and Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920 (1951), are cited.

In citing these cases, for the proposition that commercial activity cannot be regulated, petitioner fails to recognize the distinction between prohibiting purely commercial advertising and prohibiting the sale or distribution of informative

material from which the distributor derives a profit.

To hold that the mere profitability of an enterprise subjects it to a wholesale ban, would be to disregard all of the cases dealing with magazines, movies, and books, as their purveyors certainly are engaged in commercial, profitable, activity.

Valentine v. Chrestensen, supra, is inapplicable to the case at bar, for in Valentine, the Court was concerned only with the question of whether the application of an ordinance to the respondent's activity was, under the circumstances, an unconstitutional abridgement of freedom of speech and press. In holding that it was not, the Court determined that purely commercial advertising was not protected speech, and the respondent there was using a subterfuge to advertise his product.

Similarly, the Breard case is inapplicable to the case herein, inasmuch as petitioners there were arrested for soliciting subscriptions for a nationally-known magazine. Solicitation of subscriptions is commercial advertising, and is

distinguishable from the sale of the magazines themselves. Such a distinction was drawn by the California Court of Appeal in In Re Mares, 75 Cal.App.2d 798, 171 P.2d 762 (1946).

The Pittsford case,[2/] also cited by petitioner, at page 27 of his brief, does not apply here. Once again, in Pittsford, the ordinance upheld was one preventing the distribution among pedestrians or persons in vehicles of commercial advertising handbills, or any handbills distributed for the purpose of advertising any merchandise. The ordinance there was thus a narrowly-drawn one, limiting only the distribution of commercial advertising matter. Thus, petitioner's conclusion that "municipal regulation of commercial activities upon public streets and sidewalks is entirely proper", fails to make the crucial distinction between commercial activity and commercial advertising.

The ordinance in question is a wholesale ban on all printed material without

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2/ Pittsford v. City of Los Angeles, 50 Cal.App.2d 25, 122 P.2d 535 (1942).

regard to its content. It is for that reason that the Appellate Department struck it down.[3/]

IV

THE COURT BELOW COMMITTED NO CONSTITUTIONAL ERROR IN FOLLOWING YOUNG v. MUNICIPAL COURT, 16 Cal. App.2d 766, 94 Cal.Rptr. 331 (1971)

In Young v. Municipal Court, supra, the California Court of Appeals had before it an ordinance very similar to the one at bar. However, the Young ordinance did not have any savings clause whatsoever. The Court dealt with a blanket ban on the sale of goods, wares and merchandise along or upon any public road or highway.

In granting a Writ of Prohibition and declaring the ordinance unconstitutional,

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3/ The issue of whether respondent's movie maps are protected matter wss never decided in the Court below, since where a provision restricting free speech and press is involved, a Court in considering the claim of overbreadth may take into account the operation of the provision as to factual situations other than the one at bar. See, e.g., N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963).

the Court declared inter alia: ". . . the prohibitory portion of the ordinance is not narrowly limited to activities which endanger automobile traffic. It extends broadly to peaceful, communicative activities which pose not the slightest hazard to public safety. It exposes to arrest all who would sell or give pedestrians printed matter. The ordinance is unconstitutionally overbroad because its first section would punish constitutionally protected activities, although a narrower measure would fully achieve the objective . . . ." Young, at 771.

This holding was not dictum, as petitioner states, but rather it is the holding of the case.

Furthermore, the activity in question in Young was the sale of the Berkeley Barb, a local newspaper. The seller of that newspaper was clearly engaged in a commercial activity, but not engaged in commercial advertising, a distinction which petitioner throughout his petition fails to recognize.

Petitioner continuously refers to Valentine v. Chrestensen, supra, as being in contradiction to the holding in Young and the lower Court's ruling. As indicated earlier in this response, Valentine only holds that purely commercial advertising, non-informative material, is not protected. We deal here with an ordinance which overbroadly restricts the sale and distribution of informative material, as well.

V

THE CASE OF RAMOS, ET AL. v. CALIFORNIA, 73-6132, SHOULD NOT BE CONSIDERED AS A COMPANION PETITION INVOLVING AN IDENTICAL ISSUE

The Ramos case deals with a defendant's appeal after conviction under ordinance L.A.M.C. §42.00(e). This case involves a petition by the People, challenging the declaration of unconstitutionality of ordinance L.A.M.C. §42.00(d).

We are thus dealing with separate sections of an ordinance and separate bases for review. There would therefore appear to be no reason to consider the two

petitions as companions. They do not involve identical issues.

VI

CONCLUSION

For the foregoing reasons, respondent requests that this Honorable Court deny the petition for Writ of Certiorari.

Respectfully submitted,

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